IN THE HIGH COURT OF BOMBAY AT GOA.

SECOND APPEAL NO. 66 OF 2000.

Shri Indrakant Shankar Mambro,
son of Shankar Mambro, businessman,
of major age, resident of Assonora,
Bardez, Goa. ..... Appellant

V e r s u s

Mrs. Rosario Boventura Fernandes,
w/o. Aleixo Santana Fernandes, of
60 years, of age, landlady, resident
of Assonora, Bardez, Goa.
(through her LRs Olivia Dias) ..... Respondents

Mrs. A. A. Agni with Shri M. S. Prabhu Desai, Advocate for the Appellant.

J. E. Coelho Pereira, Senior Advocate with V. Korgaonkar, Advocate for the Respondent.

CORAM: N. A. BRITTO, J.

DATE: 17th March, 2006.

ORAL JUDGMENT

This is defendant's second appeal arising from R.C.S. no. 90/1989/C.

2. The parties hereto shall be referred to in the names as they

appear in the cause title of the said Civil Suit.

3. Before this Court, there are two facts which are not disputed. First, that the plaintiff is the owner in possession of the property known as "Bajarpet", surveyed under no. 9/7 of Village Assonora, and second, that what was let out (to let also means to allow) by the plaintiff to the defendant was a parcel of land of the said property admeasuring about 4.75 x 3.50 metres, adjoining the public road.

4. The case of the plaintiff was that the defendant was allowed to use the said portion of the property by virtue of Agreement of License executed on 03.10.1988, for the purpose of erecting a temporary wooden shed for selling cold drinks, for a period of two years, on payment of license fees of Rs.100/- per month. Further, it was the case of the plaintiffs that somewhere on or about 06.05.1989, the defendant carried out modification of the said temporary stall by putting foundation of laterite stones by increasing the height of the stall and by covering the sides of the stall by zinc sheets in place of wooden poles and palm leaves and thereby committing breach of the conditions of the said Agreement. It was also the case of the plaintiff that although the defendant agreed to pay monthly

license fees of Rs. 100/-, the defendant had failed and neglected to pay the same from January, 1989.

5. The case of the defendant was that he was a tenant under the provisions of Goa Rent Control Act and that the Court had no jurisdiction to entertain the suit. The defendant also pleaded that the defendant was in possession of the said portion of the property for about 20 years and was carrying on business of cold drinks and other eatables. The defendant also stated that the stall was of permanent nature. It was also the case of the defendant that about 20 years back, the plaintiff had approached the defendant and had asked him for some money as the plaintiff was finding difficulty to maintain herself, and as such, the defendant had paid advance money to the plaintiff and as the plaintiff could not pay the same, the plaintiff permitted the defendant to start business in the said space and, accordingly, the defendant took possession of the said space and took permission of the plaintiff and constructed a permanent stall of laterite stones, soon thereafter, about 20 years back and the rent for the same was fixed at Rs.60/- per month and paid the same regularly till September, 1989, as per oral agreement, but thereafter, the plaintiff started harassing the defendant during business hours and, thereafter, the defendant gave his

consent for a written agreement and, accordingly, the same was executed on 03.10.1988 and was registered before the Notary. The defendant stated that the initial rent was Rs.12/- but the same was increased in stages.

6. One of the issues framed by the trial Court was issue no. 5 and that was in relation to the plea of the defendant that the defendant was in occupation of the stall for over twenty years pursuant to an oral agreement. The learned trial Court found that the defendant had not led convincing or cogent evidence in support of the said issue. The learned trial Court also observed that the documents produced by the defendant could not be relied upon as conclusive proof, firstly, because they did not refer to the stall and, secondly because they did not show that the stall existed for the last twenty years, as pleaded by the defendant, and as such, the defendant had failed to prove the same. The learned first appellate Court observed that even if the stall was in possession of the defendant for more than 20 years, the same in no manner conferred a right on the plaintiff of tenancy, in view of the agreement of license dated 03.10.1988-exhibit P.w.1/A, as defendant's pleading and his deposition showed that what was let out by the plaintiff, was a plot where the defendant had constructed a stall for running business.

7. When this second appeal was admitted, one of the substantial questions on which it was admitted was whether the finding of the Courts below on issues nos. 1 and 5 was perverse, and, in fact, on behalf of the plaintiff, an effort was made to submit that this would be a fit case for a remand for the trial Court to give a finding whether the defendant came in occupation of the suit plot pursuant to the agreement dated 03.10.1988, as contended by the plaintiff or whether the defendant occupied the same about twenty years prior to the said agreement dated 03.10.1988. I proceed to give a finding on this aspect of the case, so that other contentions raised on behalf of the plaintiff can be examined.

8. The plaintiff's attorney had herself admitted that on the day of execution of the agreement, there was already a structure. This admission certainly fortified the case of the defendant that he had come to occupy the said plot for the purpose of erecting the said shed prior to the execution of the said agreement on 03.10.1988. Moreover, the defendant had produced several documents to support his claim that the defendant had erected the said stall almost twenty years back prior to the execution of the said agreement. The defendant had produced a certificate dated 14.08.1989, issued by the Village Panchayat stating that the defendant's shop was

existing for the last twenty years. The defendant had produced a receipt, which showed that the defendant had paid professional tax. The defendant had also produced a letter dated 18.04.1990, issued by the Assistant Engineer, Electricity Department, stating that power was supplied to the defendant on 23.07.1968. These and the other documents produced by the defendant in the light of the admission made by the plaintiff, was more than sufficient to conclude that the defendant did not come to occupy the suit plot pursuant to the agreement dated 03.10.1988, but was allowed to occupy the same from the year 1968 atleast, pursuant to an oral agreement. There is no dispute that what was orally agreed upon in the year 1968 or thereabout, was reduced into writing by agreement dated 03.10.1988 since the defendant has not taken any other plea and in fact, has admitted, that the oral agreement, was reduced into writing. In other words, in the absence of any plea having been taken by the defendant, it could be assumed, that what was orally agreed upon, in the year 1968, as contended by the defendant, was reduced into writing in agreement dated 03.10.1988.

9. Mrs. Agni, the learned Counsel on behalf of the plaintiff has submitted that once a conclusion is arrived at, that the portion of the property of the plaintiff was let to the defendant about twenty years prior to

the agreement dated 03.10.1988, i.e. in the year 1968, then the same has to be considered as a lease agreement and the agreement dated 03.10.1988 was made only to camouflage the said lease. Smt. Agni has further submitted that once it is held what was allotted is a plot of open land by way of lease, then such a lease would be protected in terms of the law of leases, namely the Decree no. 43525 dated 07.03.1961, ('Decree' for short), in force in this State of Goa, w.e.f. 07.03.1961, as held by the Division Bench of this Court in the case of ***Gangadhar Narsingdas Agrawal v. Alina D' Costa e Pinto & Ors (1989 (2) Goa L.T. 118)*** and, therefore, the plaintiff would be entitled to be evicted only in accordance with the provisions of the said Decree.

On the other hand, Shri Coelho Pereira, the learned Senior Counsel, on behalf of the plaintiff, has submitted that even if the defendant was allowed to occupy the plaintiff's property, pursuant to an oral agreement, the agreement dated 03.10.1988, was to put in writing crystallizing the terms of oral agreement. In other words, Shri Pereira submits that what was orally agreed upon 20 years prior, was reduced in writing on 03.10.1988 and if what was orally agreed upon was a license, then even if the defendant came upon the property twenty years back, it could not be

termed to be a lease. Learned Advocate Shri C. Pereira, has further submitted that various provisions of the Decree would show that any agreement to be construed as a lease agreement, under the said Decree, it had to be in writing and in the absence of a written agreement, the defendant had to prove that the agreement could not be reduced in writing due to the fault of the landlord and that nothing of this type has been pleaded or proved by the defendant. Shri Pereira further submits that the defendant did not plead that the agreement dated 03.10.1988 was a camouflage and therefore now cannot be heard to say so in second appeal.

10. There can be no dispute that there is always a marked distinction between a lease and a license. A lease is a transfer of a right to enjoy the property made for a certain time in consideration for a price paid or promised and a lessee is entitled to be put in possession of a property and as such a lease is a transfer of land; a license gives only a right to use a property in a particular way or under certain terms while it remains in possession of the owner thereof and the Licensee is permitted to make use of the premises but for the permission, his occupancy would be unlawful and it does not create in his favour any interest in the property and there is always a clear distinction between the two concepts though the dividing line

between the two at times is very thin or even blurred and the dominant test always being the intention of the parties. A reference to the authorities cited on behalf of the defendant will not be out of context. In the case of ***Tulsi v. Paro (Dead) [(1997) 2 S.C.C. 706],*** what has been stated by the Apex Court is that it is not necessary that the lease should always be reduced to writing. In ***Achintya Kumar Saha v. Nanee Printers and Ors. [(2004) 12 S.C.C. 368]***, it has been stated by the Apex Court that where the Courts are required to consider the nature of transactions and the status of parties thereto, one cannot go by mere nomenclatures such as, licence, licensee, etc., and in order to ascertain the substance of the transaction, the Court has to ascertain the purpose or substance of the agreement and, in such cases, the intention of the parties is the deciding factor and in order to ascertain the intention, the Court has to examine the surrounding circumstances including the conduct of the parties. The Apex Court also held that when the core issue is not adjudicated upon, it results in a substantial question of law under Section 100 C.P.C.

11. In the case of ***Sohan Lal Naraindas v. Laxmidas Raghunath Gadit (1971 (1) S.C.C. 276)***, the Supreme Court has stated that the intention of the parties to an instrument must be gathered from the terms of

the agreement examined in the light of the surrounding circumstances. The description given by the parties may be evidence of the intention but is not decisive. Mere use of the words appropriate to the creation of a lease will not preclude the agreement operating as a licence. A recital that the agreement does not create a tenancy is also not decisive. The crucial test in each case is whether the instrument is intended to create or not to create an interest in the property the subject-matter of the agreement and if it is in fact intended to create an interest in the property it is a lease, if it does not, it is a licence and in determining whether the agreement creates a lease or a licence, the test of exclusive possession, though not decisive, is of significance.

12. The plea of tenancy under the Goa Rent Act presumably could not be pursued because what was let out to the defendant was not a house or building but a piece of land for the purpose of carrying out business by installing a temporary stall. In my view, whether the defendant is a tenant under the Decree or not, is a mixed question of fact and law and, being so, it cannot be raised for the first time in a second appeal. The Apex Court in the case of ***Santosh Hazari v. Purushottam Tiwari (deceased) by LRS. [(2001) 3 S.C.C. 179],*** has held that a point of law which admits of no two

options may be a proposition of law but cannot be a substantial question of law. To be "substantial", a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case and if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law involved in the case, there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. Admittedly, the plea that the defendant is a tenant under the Decree, was not raised by the defendant before both the Courts below. Article 8.1 of the Decree requires that an agreement of lease has got to be drawn in writing with the signature of the lessor and the lessee and in case they do not know to sign, it has to be made in the presence of two witnesses. In case a lease is not in writing, it can be admitted in evidence but it has to be shown that the lack of writing was attributable to the lessor or the lessee. In the case at hand, the lease having been for the purpose of commerce or business as contemplated by Article 10.1(b), had to be in writing and by public deed. The Judgment of

this Court in ***S.A. No. 51/97 dated 16.09.2005***, in the case of ***Noberto De Andrade v. Prema Nalband***, is inapplicable to the facts of this case. In that case, there was a lease agreement in writing. In the absence of plea of tenancy under the Decree having not been taken by the defendant nor evidence having been led as regards its requirements under the Decree, the defendant cannot now be heard for the first time in second appeal that he is a tenant protected by the Decree and therefore could be evicted only on grounds of eviction available under the said Decree.

13. Admittedly, the defendant did not come upon the plaintiff's property for the purpose of erection of a temporary stall pursuant to a written agreement but came upon it pursuant to an oral agreement, the terms of which were subsequently reduced into writing on 03.10.1988. In other words, what was orally agreed upon was put in writing by both the parties on 03.10.1988, by way of an agreement styled by them as *Leave and License*. Both the Courts below have come to the conclusion that the agreement between both the parties was indeed a license agreement. On behalf of the defendant, emphasis is placed on clause no. 1, which provides that the licensee shall take partial possession of the plot with effect from the date of the agreement for a period of two years at a monthly license fee of

Rs.100/-; on clause (4) which provides that on expiry of two years i.e. 02.10.1990, the licensor shall be deemed to be in possession of the plot on which the stall is erected; on clause (5), which provides that the licensee shall remove the stall on or before 02.10.1990 and it is expressly agreed that no notice is necessary for the same; on clause (6), which provides that the agreement itself is the notice for such removal and eviction and on clause (8) that the licensor is in exclusive physical possession of the plot and no agreement entered into by the parties hereto, with the licensee has any effect. It is submitted on behalf of the defendant with reference to the said clauses that the plaintiff is in possession of the land and, therefore, the agreement had to be essentially construed as a lease agreement. On the other hand, Shri C. Pereira, the learned Counsel has referred to clause (6), which according to the learned Counsel, shows that the legal possession was with the plaintiff and that the possession of defendant was precarious. The learned Counsel Shri Pereira has also referred to clause (7), which provides that if the licensee by force remains on the plot under one pretext or other or by force or by deception, he shall be deemed to be a trespasser and would be liable to be evicted or removed physically by the licensor and the licensee shall have no excuse in any Court or before any authority. Shri Coelho Pereira has then referred to clause (11), which provides that the

existing stall in the property, would be the property of the licensor, which according to learned Counsel shows that, on expiry of the license, the licensee will not have even a right to the stall. Reference is also made to clause (12), which provides that, if the present stall is retained on expiry of the license period, it be deemed to be in exclusive possession of the licensor. Reference is also made to clause (13), which provides that the licensee shall not do any modification, repair or renovation or construction of any nature to the stall or in the plot without prior written permission of the licensor and in case he does any alteration, it shall be a breach of the conditions of the agreement and the licensee would be liable for eviction immediately from the stall.

14. To repeat, there is no dispute that what was orally agreed upon by the defendant with the plaintiff in September 1988 or thereabout, was reduced into writing by the parties on 03.10.1988. It was not at all the case of the defendant that the agreement dated 03.10.1988 was camouflaged or what was agreed orally in September, 1988, did not reflect in agreement dated 03.10.1988 or for that matter, what was orally agreed in September, 1988, was different from what was agreed on 03.10.1988 or for that matter, the terms orally agreed upon were more beneficial to him then those agreed

upon in agreement dated 03.10.1988. This is a case where both the parties have chosen to style the agreement as *Leave and License* and both the Courts below have held it to be so. Intention of the parties have to be gathered from terms used. In my view, the agreement styled as *Leave and License,* when read as a whole is clear and unambiguous and shows that the parties intended to create a relationship which was not higher than license and indeed a license only. Admittedly, there were breaches committed by the defendant in relation to the said agreement one of them being by non-payment of the compensation. As per the plaintiff, the plaintiff had received a compensation of Rs.500/-, which means that the plaintiff has not been paid any compensation from May 1989. However, according to the defendant himself, he paid rent of only one month and have not paid anything thereafter either directly to the plaintiff or depositing the same in the Court after the filing of the suit. The defendant also admitted that he had modified the stall but stated that it was done by the consent of the plaintiff. The learned trial Court has concluded that the defendant has committed breach of two conditions of the agreement namely failing to pay the license fee and carrying out repairs/modification without the written consent of the plaintiff, which finding has not been disturbed by the learned first appellate Court. Having committed breaches of the said agreement,

the defendant was certainly liable to be evicted from the portion of the property of the plaintiff on which the defendant was allowed to erect the said stall. Even assuming the said agreement dated 03.10.1988, was to be construed as a lease agreement, then nothing turns out on the same for the lease being of the plot of land of the plaintiff, was liable to be terminated for breaches of the agreement. In fact, the plaintiff by notice dated 12.05.1989, had called upon the plaintiff to vacate the stall and give free and vacant possession to the plaintiff before the filing of the suit, which the defendant did not comply with.

15. In view of the discussions supra, the substantial questions of law framed on 14.09.2000, in terms of Para (a) to (f) are answered against the defendant. Consequently, I find there is no merit in the second appeal and, therefore, the same is hereby dismissed with costs.

N. A. BRITTO, J.

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